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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

10 GREGORY A. STRASBURG, Individually ) CASE NO. 08 CV 0021 JLS (BLM)  
11 and as Trustee of the GREGORY A. )  
12 STRASBURG REVOCABLE TRUST dated ) IN ADMIRALTY  
4/8/2003 )

13 Plaintiffs

14 | P a g e

15 M/Y JUST A NOTION, Official Number  
16 1089525, her engines, tackle, furniture and  
17 appurtenances, in rem; PETER BLAIR, in  
18 personam; JIM SINGLETON, in personam;  
and THE YACHT CLUB, LLC., a Nevada  
Corporation

19 Defendants.

CASE NO. 08 CV 0021 JLS (BLM)

IN ADMIRALTY

DEFENDANT SINGLETON'S  
SUPPLEMENTAL REPLY  
MEMORANDUM TO MOTION TO  
DISMISS THE SECOND, THIRD,  
FOURTH AND FIFTH CAUSES OF  
ACTION FOR FAILURE TO STATE A  
CLAIM UPON WHICH RELIEF CAN BE  
GRANTED [FRCP 12(B)(6)], OR, IN THE  
ALTERNATIVE, MOTION FOR A  
MORE DEFINITE STATEMENT

Date: March 28, 2008  
Time: 10:30 a.m.  
Judge: Hon. Janis L. Sammartino  
Dept.: Courtroom 6

1       Defendant Jim Singleton, severing himself from all other defendants, submits this  
2 Supplemental Reply Memorandum in Support of Motion to Dismiss the Second, Third, Fourth, and  
3 Fifth Causes of Action.<sup>1</sup> His Motion to Dismiss should be granted, without leave to amend.

I

## INTRODUCTION AND SUMMARY OF ARGUMENT

6 The Second, Third, Fourth and Fifth Causes of Action in the Complaint all sound in fraud.  
7 Therefore, all must be pled with particularity against each Defendant. The Complaint fails to do so,  
8 particularly with respect to Defendant Jim Singleton. The Complaint's only substantive allegation  
9 with respect to Defendant Singleton is that he loaned money to and/or purchased shares in Defendant  
10 The Yacht Club, LLC and that he now claims to be an owner of the Vessel which is the subject of  
11 these proceedings. Cplt. ¶ 11. There is not one single statement of any type in the Complaint  
12 attributed to Defendant Singleton.

13 Plaintiffs' Opposition concedes that their Complaint is devoid of any allegations of any  
14 representations made by Defendant Singleton: “[e]ach of the specific statements set forth in the  
15 Complaint were made by Defendant Blair.” Opposition Brief, page 2, fn. 1. Plaintiffs' Opposition  
16 nevertheless argues, without any citation to the Complaint (because there is none), that “it is  
17 believed those statements were made of behalf of all Defendants.” Id. However, Plaintiffs cannot  
18 plead their case against Defendant Singleton in their Opposition. Even if they could, that conclusory  
19 allegation, even if not based only on their belief is insufficient. Therefore, Defendant Singleton's  
20 motion to dismiss should be granted.

21 Moreover, the Court should grant Defendant Singleton's motion to dismiss without leave to  
22 amend. In an apparent effort to add particularity in their Opposition that is absent from their  
23 Complaint, Plaintiffs assert in their Opposition that the object of the fraud was to induce Plaintiff

26 <sup>1</sup> On March 18, 2008, Singleton's former attorney Michael McDonnell, filed a reply brief on behalf  
27 of all defendants whom he was jointly representing at the time. On March 19, 2008, Mr. Singleton  
28 retained this firm to represent his interests in this matter. This Supplemental Reply Memorandum,  
even if combined with the Reply Brief previously filed, does not exceed the allowable page limit for  
a reply, much less one which is the first paper filed on his behalf alone and not for multiple  
Defendants.

1 Strasburg to transfer ownership of the Vessel to Defendant Yacht Club, LLC by entering into a  
 2 written contractual Operating Agreement.

3 "In the present case Plaintiff alleges Defendant Blair (on behalf of  
 4 himself and all other defendants [which is an allegation not made in  
 5 the Complaint] made specific representations to Plaintiff Greg  
 6 Strasburg with the purpose of inducing Plaintiff to transfer ownership  
 7 of Plaintiff's Vessel to Defendant Yacht Club, LLC. Plaintiff entered  
 8 into a written contractual "Operating Agreement" with Defendants as a  
 9 direct result of the false representations. . . Specifically, the Complaint  
 10 alleges that Defendant Blair made numerous false statements to induce  
 11 (set forth in the Complaint with particularity) to Plaintiff Strasburg to  
 12 have him enter into the Operating Agreement."

13 Opposition Brief, page 2, lines 9-15.

14 However, the actual transactional documents underlying these transactions -- that is, the  
 15 Operating Agreement itself and the documentation concerning Singleton's loan transaction -- show  
 16 that Singleton's involvement in the loan transaction -- his only involvement alleged in the Complaint  
 17 -- was over one year after Strasburg entered into the Operating Agreement. Therefore, Plaintiffs  
 18 would have no probable cause to amend to allege that Singleton was part of any fraud to induce  
 19 Strasburg to enter into the Operating Agreement.

20 Defendant Singleton may present to the Court these transactional documents because  
 21 Plaintiffs rely on those transactions and have failed to provide them to the Court.<sup>2</sup> Accordingly the  
 22 Operating Agreement (dated January 18, 2006) is attached hereto as Exhibit 1 and the  
 23 documentation of Defendant Singleton's loan (which is in the form of an Amendment to the  
 24 Operating Agreement and which is dated over one year later, January 25, 2007) is attached hereto as  
 25 Exhibit 2. It is Exhibit 6 to the Operating Agreement (Exhibit 1 hereto) that sets out Plaintiff  
 26 Strasburg's duty to transfer to Defendant Yacht Club, LLC "all right, title and interest in the yacht  
 27 known as "JUST A NOTION". However, that Operating Agreement was executed more than a year  
 28

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26 <sup>2</sup> Plaintiff is not required to attach to the complaint the documents on which the complaint is based  
 27 but the defendant may attach the referenced documents to a Rule 12(b)(6) motion to show that  
 28 they do not support plaintiff's claim. *Bryant v. Avado Brands, Inc.* (11<sup>th</sup> Cir. 1999) 187 F.3d  
 1271, 1281, fn. 16 (emphasis added). The Ninth Circuit calls this practice the incorporation by  
 reference doctrine. *Id.* This prevents a plaintiff with a legally deficient claim from surviving a  
 motion to dismiss simply by failing to attach a dispositive document on which it relied. *Pension  
 Benefit Guaranty Corp. v. White Consolidated Industries, Inc.* (3<sup>rd</sup> Cir. 1993) 998 F.2d 1192, 1196.

1 before Defendant Singleton's involvement in the transactions which are the subject of the  
 2 Complaint.

3

4

5 **II.**6 **THE COMPLAINT ALLEGES NEITHER ANY STATEMENTS BY SINGLETON NOR**  
**7 ANY THEORY UNDER WHICH SINGLETON COULD BE LIABLE FOR ANY**  
**STATEMENTS MADE BY ANY OTHER DEFENDANT**

8 A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) when the  
 9 factual allegations do not raise the "right of relief above the speculative level." *Bell Atlantic v.*  
 10 *Twombly* (2007) 127 S.Ct. 1955, 1965. For fraud allegations, plaintiffs must particularly state the  
 11 circumstances and facts which are the basis for any fraud cause of action. FRCP Rule 9(b). "We  
 12 have interpreted Rule 9(b) to mean that the pleader must state the time, place, and specific content of  
 13 the false representations as well as the identities of the parties to the misrepresentation." *Schreiber*  
 14 *Distributing Co. v. Serv-Well Furniture Co., Inc.* (9<sup>th</sup> Cir. 1986) 806 F.2d 1393, 1401.

15 The Complaint states only allegations regarding statements of Defendant Blair, not  
 16 Defendant Singleton. Rule 9(b) does not allow a complaint to merely lump multiple defendants  
 17 together but "require[s] plaintiffs to differentiate their allegations when suing more than one  
 18 defendant ... and inform each defendant separately of the allegations surrounding his alleged  
 19 participation in the fraud." *Swartz v. KPMG LLP* (9<sup>th</sup> Cir. 2007) 476 F.3d 756, 764-65. "[T]he  
 20 plaintiffs must, at a minimum, 'identify the role of each defendant in the alleged fraudulent  
 21 scheme.'" *Id.* (quoting *Moore v. Kayport Package Express, Inc.* (9th Cir. 1989) 885 F.2d 531, 541).  
 22 The Complaint does not. Nor does it include any allegation of any agency or conspiracy relationship  
 23 between Defendant Blair and Defendant Singleton.

24

**III.**25 **PLAINTIFFS MAY NOT SUPPLEMENT THE ALLEGATIONS IN THEIR COMPLAINT**  
**26 WITH CONCLUSORY ALLEGATIONS OF AGENCY OR CONSPIRACY IN THEIR**  
**OPPOSITION TO THE MOTION TO DISMISS.**

27

28 Plaintiffs' Opposition to the Motion to Dismiss states the conclusory allegations the  
 statements alleged in the Complaint to have been made by Defendant Blair were made on behalf of

1 Defendant Singleton. Opp. fn 1. Plaintiffs' tactics are unavailing for two reasons. First, Plaintiff  
 2 may not defeat a motion to dismiss under FRCP 12(b)(6) with contentions in their Opposition to that  
 3 motion. Facts argued in briefs cannot be considered. *Arpin v. Santa Clara Valley Transportation*  
 4 *Agency* (9<sup>th</sup> Cir. 2001) 261 F.3d 912, 925. Second, even if Plaintiffs could "append" to their  
 5 Complaint allegations found only in their Opposition, the mere conclusory allegation that "it is  
 6 believed" that the statements made by Defendant Blair "were made on behalf of all Defendants"  
 7 (Opp. fn. 1) is insufficient to satisfy the particularity requirement of FRCP Rule 9(b).

8 A motion to dismiss can be used when the plaintiff has stated the claim in vague, conclusory  
 9 terms without setting forth one or more key elements. "When a plaintiff alleges that a defendant is  
 10 liable for intentional misrepresentation under either an agency or civil conspiracy theory, Rule 9(b)  
 11 requires that the plaintiff allege with particularity facts that support the existence of an agency  
 12 relationship or civil conspiracy." *Swartz v. KPMG LLP* (9<sup>th</sup> Cir. 2007) 476 F.3d 756, 764-65.

13 Although the Court is required to assume all facts alleged are true for purposes of ruling on  
 14 the motion to dismiss, legal conclusions need not be taken as true merely because they are cast in the  
 15 form of factual allegations. *Robertson v. Corrothers* (9<sup>th</sup> Cir. 1981) 812 F.2d 1173, 1177. "Nor is  
 16 the court required to accept as true allegations that are merely conclusory, unwarranted deductions of  
 17 fact, or unreasonable inferences." *Sprewell v. Golden State Warriors* (9th Cir. 2001) 266 F.3d 979,  
 18 988, amended by 275 F.3d 1187 (9th Cir. 2001). Neither the Complaint nor the Opposition alleges  
 19 any facts regarding an agency or conspiracy relationship involving Defendant Singleton.

20 To allege an agency relationship, a plaintiff must allege: (1) that the agent or apparent agent  
 21 holds power to alter legal relations between principal and third persons and between principal and  
 22 himself; (2) that the agent is a fiduciary with respect to matters within scope of agency; and (3) that  
 23 the principal has right to control conduct of agent with respect to matters entrusted to him. *Garlock*  
 24 *Sealing Technologies LLC v. NAK Sealing Technologies, Corp.* (2007) 148 Cal.App.4th 937, 965.  
 25 The Complaint contains no such allegations against Singleton.

26 Similarly, to allege a civil conspiracy, a plaintiff must allege: "(1) the formation and  
 27 operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage  
 28 resulting from such act or acts." *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App. 4th 1224,

1 1236. "To allege the formation and operation of the conspiracy, the plaintiff must allege an  
 2 agreement to commit the wrongful acts." *Wasco Products, Inc. v. Southwall Tech., Inc.*(9<sup>th</sup> Cir.  
 3 2006) 435 F.3d 989, 992. Again, the Complaint contains no such allegations against Singleton.

4 For example, in a recently decided case, this Court reviewed allegations in a complaint  
 5 alleging agency and conspiracy as the basis for a fraud cause of action and found the allegations  
 6 insufficient to support the causes of action plead. *Palomares v. Bear Stearns Residential Mortg.*  
 7 *Corp.* (S.D.Cal., 2008) 2008 WL 686683. The complaint in that case stated, "...every Defendant  
 8 was an agent and/or employee of each and every other Defendant," and "[e]ach and every Defendant  
 9 was acting within the course and scope of this agency or employment with the consent, permission,  
 10 and authorization of the remaining Defendants, or otherwise acting with apparent authority." *Id.* The  
 11 complaint in *Palomares* also alleged "there existed a civil conspiracy between Defendants, and each  
 12 of them, the object of which was to reap substantial profits by targeting Plaintiffs, and those  
 13 similarly situated," and that there was "a common plan or design" to defraud the plaintiffs. *Id.* This  
 14 Court found those conclusory allegations insufficient to satisfy the pleading burden Rule 9(b)  
 15 imposes upon plaintiffs. Plaintiffs have not even undertaken to plead, either in their Complaint or  
 16 their Opposition, the conclusory allegation present in *Palomares*, which themselves were legally  
 17 insufficient.

18 For all of these reasons, the Court should grant Singleton's Motion to Dismiss.

19 **IV.**

20 **THE COURT SHOULD NOT PERMIT PLAINTIFFS LEAVE TO AMEND BECAUSE  
 21 PLAINTIFFS HAVE NO PROBABLE CAUSE TO ALLEGE THAT SINGLETON  
 22 PARTICIPATED IN ANY FRAUD TO INDUCE STRASBURG TO ENTER INTO THE  
 23 OPERATING AGREEMENT.**

24 Leave to amend may be denied only if the court determines that allegations of other facts  
 25 consistent with the challenged pleading could not possibly cure the defect. *Schreiber Distributing*  
*Co. v. Serv-Well Furniture Co., Inc.* (9<sup>th</sup> Cir. 1986) 806 F2d 1393, 1401. Here, as stated in Section I  
 26 above, the underlying documents of the transactions Plaintiffs refer to in their Complaint and  
 27 Opposition show that Plaintiffs would lack any probable cause to amend to allege that Singleton  
 28 participated in any fraud to induce Plaintiff Strasburg to sign the Operating Agreement and thereby

1 to agree to transfer his interest in the Vessel to Defendant Yacht Club, LLC. Simply put, there is no  
2 evidence that Singleton was involved in any transactions involving Plaintiffs or the Vessel until  
3 more than one year after Plaintiff signed the Operating Agreement.

4 To decide a motion to dismiss, courts generally consider only the allegations contained in the  
5 complaint, exhibits attached to the complaint and matters of public record. *Pension Benefit Guaranty*  
6 *Corp. v. White Consolidated Industries, Inc.* (3<sup>rd</sup> Cir. 1993) 998 F.2d 1192, 1196. Plaintiff is not  
7 required to attach to the complaint the documents on which the complaint is based but the defendant  
8 may attach the referenced documents to a Rule 12(b)(6) motion to show that they do not support  
9 plaintiff's claim. *Bryant v. Avado Brands, Inc.* (11<sup>th</sup> Cir. 1999) 187 F.3d 1271, 1281, fn. 16  
10 (emphasis added). The Ninth Circuit calls this practice the incorporation by reference doctrine. *Id.*  
11 This prevents a plaintiff with a legally deficient claim from surviving a motion to dismiss simply by  
12 failing to attach a dispositive document on which it relied. *Pension Benefit Guaranty Corp. v. White*  
13 *Consolidated Industries, Inc.* (3<sup>rd</sup> Cir. 1993) 998 F.2d 1192, 1196.

14 Therefore, under this doctrine, Singleton is permitted to submit to this Court the documents  
15 underlying the transactions alleged by Plaintiffs: the Operating Agreement Strasburg was allegedly  
16 tricked by Defendant Blair into executing (referred to in Plaintiffs' Opposition at 2 lines 9 - 15) and  
17 the documents evidencing the loan made by Singleton (referred to in the Complaint ¶ 11). Those are  
18 submitted herewith as, respectively, Exhibits 1 and 2. The Court can consider these documents  
19 when deciding the Motion to Dismiss.

20 The Operating Agreement (Ex. 1) establishes that Singleton is not a party to that Agreement.  
21 Thus, Plaintiffs' contention that they "will demonstrate Defendants violated their obligations under  
22 the contractual Operating Agreement" (Opposition Brief, page 2:26-3:1) would be unavailing  
23 against Singleton even if Plaintiffs were to add it to an amended complaint. Similarly, the Loan  
24 transaction, documented as an Addendum to the Operating Agreement, is signed by Singleton only  
25 as Lender. He had no obligations thereunder other than to lend money to the LLC. Plaintiffs have  
26 no probable cause to allege that he did not. Finally, because the Loan transaction was entered into  
27 on January 25, 2007, more than a full year after Strasburg entered into the Operating Agreement on  
28 January 18, 2006, Plaintiffs would have no probable cause to amend to allege that Singleton

1 participated in any fraudulent representations or omissions to induce Plaintiff Strasburg to sign the  
2 Operating Agreement and obligate himself to transfer the Vessel to the LLC.

3 For all of these reasons, there should be no leave to amend.

4 **III**

5 **CONCLUSION**

6 In sum, the Complaint contains no allegation of any statement by or on behalf of Defendant  
7 Singleton to Plaintiffs. It contains no allegation of any conspiracy or agency relationship between  
8 Defendant Singleton and Defendant Blair. For this reason the Defendant Singleton's Motion to  
9 Dismiss the Fraud Claims should be granted.

10 Moreover, the documentation of the transactions referred to in Plaintiff's Complaint and in  
11 their Opposition, which Plaintiff artfully elected not to provide to the Court but which Defendant  
12 Singleton has provided herewith, illustrate that Plaintiff would have no probable cause to allege with  
13 particularity in any amended complaint that Defendant Singleton had any connection to Plaintiff's  
14 decision to execute the Operating Agreement and/or to incur the obligation to transfer the Vessel to  
15 the Defendant LLC. In fact, the evidence is that Defendant Singleton was not a member of the LLC,  
16 but became a mere lender thereto over one year after the LLC was formed and after Plaintiff  
17 Strasburg signed the Operating Agreement which created his obligation to transfer the Vessel to the  
18 LLC.

19 Accordingly, Defendant Singleton's motion to dismiss should be granted without leave to  
20 amend.

21 Dated: March 21, 2008

22 SULLIVAN HILL LEWIN REZ & ENGEL  
A Professional Law Corporation

23 By: /s/ David B. Hopkins  
24 David B. Hopkins  
25 Attorney for Defendant Jim Singleton  
26 hopkins@shlaw.com  
27  
28

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

3 GREGORY A. STRASBURG, Individually  
4 and as Trustee of the GREGORY A.  
STRASBURG REVOCABLE TRUST dated  
4/8/2003,  
5 Plaintiff,  
6  
7 v.  
8 M/Y JUST A NOTION, Official Number  
9 1089525, her engines, tackle, furniture and  
appurtenances, in rem; PETER BLAIR, in  
personam; JIM SINGLETON, in personam;  
and THE YACHT CLUB, LLC, a Nevada  
10 Corporation,  
11 Defendants.  
Case No. 08 CV 0021 JLS (BLM)  
Judge: Hon.  
**CERTIFICATE OF SERVICE**  
Date: March 28, 2008  
Time: 10:30 a.m.  
Judge: Hon. Janis L. Sammartino  
Dept.: Courtroom 6  
Mag. Judge: Hon. Barbara Lynn Major  
Complaint Filed: January 3, 2008

IT IS HEREBY CERTIFIED THAT:

14 I, Marnie Cruz, am over the age of 18 years. My business address is 550 West C Street, San  
15 Diego, California 92101.

16 I am not a party to the above-captioned action. I have caused service of the following  
17 documents:

1. DEFENDANT SINGLETON'S SUPPLEMENTAL REPLY  
MEMORANDUM TO MOTION TO DISMISS THE SECOND, THIRD,  
FOURTH AND FIFTH CAUSES OF ACTION FOR FAILURE TO STATE A  
CLAIM UPON WHICH RELIEF CAN BE GRANTED [FRCP 12(B)(6), OR,  
IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE  
STATEMENT]

22 on the following parties by electronically filing the foregoing with the Clerk of the District Court  
23 using its ECF System, which electronically notified them

24 1. James W. Alcantara, Esq., Alcantara and Associates, 402 West Broadway, Suite  
25 1170 Emerald Plaza, San Diego, CA 92101-3542, [jima@alcantaraassociates.com](mailto:jima@alcantaraassociates.com), Attorneys for  
26 Plaintiff Gregory A. Strasburg.

1           2.       Douglas M. Field, Esq., McDonnell and Associates, 2040 Harbor Drive, Suite  
2       202, San Diego, CA 92101, dfield@mrlawgroup.com, Attorneys for Defendants M/Y Just a  
3       Notion; Peter Blair and The Yacht Club, LLC.

4 I hereby certify that I have also caused the foregoing documents, to be mailed by the  
5 United States Postal Service, First Class Mail to the following:

6 1. James W. Alcantara, Esq., Alcantara and Associates, 402 West Broadway, Suite  
7 1170 Emerald Plaza, San Diego, CA 92101-3542, [jima@alcantaraassociates.com](mailto:jima@alcantaraassociates.com), Attorneys for  
8 Plaintiff Gregory A. Strasburg.

9           2.     Douglas M. Field, Esq., and Michael A. McDonnell, McDonnell and Associates,  
10 2040 Harbor Drive, Suite 202, San Diego, CA 92101, [dfield@mrlawgroup.com](mailto:dfield@mrlawgroup.com), Attorneys for  
11 Defendants M/Y Just a Notion; Peter Blair and The Yacht Club, LLC.

12 I declare under penalty of perjury that the foregoing is true and correct.

s/s Marnie Cruz  
Marnie Cruz